DOREE INDUSTRIES (M) SDN BHD & ORS

v.

SRI RAM & CO & ORS

HIGH COURT MALAYA, IPOH
SU GEOK YIAM JC
[CIVIL SUIT NOS: 22-264-99, 22-265-99,
22-266-99 & 22-267-99]
23 MARCH 2001

CIVIL PROCEDURE: *Striking out - Principles applicable - Whether filing of unconditional appearance and statement of defence a bar to filing of application for striking out - Whether claim frivolous, vexatious and abuse of process of court - Whether reasonable cause of action disclosed*

TORT: *Defamation - Libellous letter - Letter from solicitors containing defamatory remarks - Whether there was publication - Whether actionable*

The 1st plaintiff made a claim against its insurers, the 4th defendant, a licensed insurance company, under a fire insurance policy for the sum of RM3,665,458. The 4th defendant refused to pay on the ground that the cause of the fire was due to arson, relying on forensic reports allegedly prepared by the 2nd and 3rd defendants. The 1st plaintiff was denied a copy of the reports and lodged a complaint with Bank Negara against the 4th defendant. In response to a letter from Bank Negara, the 1st defendant, as solicitors for the 4th defendant, replied to the 1st plaintiff.

The four plaintiffs alleged that the four defendants falsely and maliciously caused to be printed and published by extending a copy of the letter to Bank Negara containing false and malicious subjective assertions which were arrived at by the four defendants, jointly and severally, upon reading the various reports prepared by the 2nd and 3rd defendants and that by doing so they have caused detriment to the four plaintiffs. There was also publication of the defamatory letter by way of carbon copying the letter to a firm of advocates and solicitors.

The 2nd defendant's application to strike out the plaintiffs' amended statement of claim pursuant to O. 18 r. 19(1) of the Rules of the High Court 1980 ('RHC') was allowed by the deputy registrar. The plaintiffs appealed against this decision.

Held:

[1] The words "at any stage of the proceedings" in O. 18 r. 19 of the RHC expressly exclude any time limit for the making of an application for striking out and these words should be given effect to. The mere fact that the 2nd defendant has filed an unconditional appearance and a statement of defence does not bar or preclude the 2nd defendant from applying to strike out the plaintiffs' claim under O. 18 r. 19 of the RHC.

[2] The fact that in their claim for damages for defamation, the 2nd, 3rd and 4th plaintiffs are not entitled to claim the insurance money does not mean that their claim is frivolous and vexatious and an abuse of process because they also claimed aggravated damages for libel and general damages as well.

[3] The deputy registrar had erred when he decided solely on the absence of publication of the alleged defamatory letter on the part of the second defendant. On the facts, there was publication by the second defendant of the findings in the alleged defamatory reports to the fourth defendant and from the fourth defendant to the first defendant and thereafter to the third parties concerned.

[4] The plaintiffs have a reasonable cause of action against the 2nd defendant and, therefore, the learned deputy registrar was wrong when he allowed the plaintiffs' statement of claim to be struck out under O. 18 r. 19(1) of the RHC.

[Appeal allowed.]

Case(s) referred to:

A-G of Duchy of Lancaster v. London and North Western Railway Co [1892] 3 Ch 274 ***(refd)***

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [1995] 1 CLJ 461 ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corp Bhd [1993] 4 CLJ 7 ***(refd)***

Bank Bumiputra Malaysia Bhd & Anor v. Lorrain Esme Osman & Anor Action [1987] 2 MLJ 633 ***(refd)***

Bhailal Jagadish v. Additional Commissioner, Akola AIR [1953] Nag 89 ***(refd)***

Brickwood Consolidated Sdn Bhd v. Kenneth Teh Ah Kian & Anor [2000] 4 AMR 4853 ***(refd)***

DC Sangma v. State of Assam AIR [1978] SC 17 ***(refd)***

Hatchard v. Mege [1887] QBD 771 ***(refd)***

Hough v. Windus [1884] 12 QBD 224 ***(refd)***

Institute of Commercial Management United Kingdom v. New Straits Times Press (Malaysia) Bhd [1993] 2 CLJ 365 ***(refd)***

Jamir Hassan v. Kang Min [1991] 3 CLJ 2490; [1991] 2 CLJ (Rep) 773 ***(refd)***
Jasa Keramat Sdn Bhd & Anor v. Monotech (M) Sdn Bhd [1999] 4 CLJ 533 ***(refd)***
Kaye v. Robertson [1991] FSR 62 ***(refd)***
Lim Seak Huat v. Malayan United Realty Sdn Bhd [1997] 5 CLJ 336 ***(refd)***
Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor [1984] 2 CLJ 88; [1984] 1 CLJ (Rep) 211 ***(refd)***
Low Yat v. Grace [1947] MLJ 115 ***(refd)***
N Caruppaya v. MBf Property Services Sdn Bhd & Anor [2000] 4 CLJ 116 ***(refd)***
Peck v. Russell [1899] 1 QB 86 ***(refd)***
Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors [1999] 2 CLJ 886 ***(refd)***
Re Orr Ewing 22 Ch D 463 ***(refd)***
S Manikam & Ors v. Ismail Mohamad & Ors [1997] 2 MLJ 90 ***(refd)***
Sarjit Singh Khaira v. Government of the State of Sarawak & Anor [1990] 2 CLJ 95; [1990] 3 CLJ (Rep) 59 ***(refd)***
Sheldon v. Brown Bryley's Steel Works Ltd & Dawnways Ltd [1953] 2 QB 393 ***(refd)***
SK Shana Ltd v. State of Bihar AIR [1953] Pat 161 ***(refd)***
The Queen v. Bishop of Oxford [1879] 4 QBD 245 ***(refd)***
Quebec Railway, Light, Heat & Power Co Ltd v. Vandry AIR [1920] PC 181 ***(refd)***
Wenlock v. Moloney & Ors [1965] 2 All ER 871 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (c), O. 33 r. 2

Other source(s) referred to:
Clerk & Lindsell on Torts, 2000, 18th edn, p 1244
Halsbury's Laws of England, 4th edn, reissue, vol 28
Libel and Slander, pp 17, 19, 32, 33, para 32
NS Bindra's Interpretation of Statutes, 8th edn, p 195

For the plaintiff - Ngan Siong Hing (Angie Neoh Hooi Sim); M/s Abbas & Ngan
For the defendant - PH Looi; M/s Zaid Ibrahim & Co

Reported by Yow Ting Fong

JUDGMENT

Su Geok Yiam JC:
This is an appeal against my decision allowing the plaintiffs' appeal (encl. 82) against the decision of the learned deputy registrar in striking out the plaintiffs' claim against the 2nd defendant on the ground that the plaintiffs' statement of claim did not disclose a reasonable cause of action against the 2nd defendant.

Facts And Background
The 1st plaintiff is a limited company. It owns a factory which manufactures yarn and curtain tapes. The 2nd and 3rd plaintiffs are its directors. The 4th plaintiff was in charge of the management of the 1st plaintiff as its manager.

On 23 February 1998, a fire gutted the factory and destroyed and damaged the 1st plaintiff's plants, machinery, raw materials, stock-in-trade and other contents, thereby causing substantial loss and damage to the 1st plaintiff.

The plaintiffs did not know how the fire started. The plaintiffs lodged a police report *vide* Pusing Report No. 186/98.

The police carried out an investigation into the fire. The Chemistry Department in its report *vide* No. IP-408/98-0 issued on 31 March 1998 stated that it did not find any inflammable hydrocarbons. On 12 March 1999, the Kinta District Police stated in its report that the fire was caused by internal accident, suspected due to the fault of a small generator in the factory and that from the investigation conducted there was no signs of criminal activity.

The 1st plaintiff made a claim against its insurers, the 4th defendant, a licensed insurance company, under some policies which included a fire insurance policy for the sum of RM3,665,458.

The 4th defendant denied liability and refused to pay on the ground that the cause of the fire was due to arson. It relied on a forensic report/reports allegedly prepared by the 2nd and 3rd defendants' agents and/or employees. The 1st plaintiff was denied a copy of the report/reports by the 4th defendant despite making several requests. So it lodged a complaint with Bank Negara against the 4th defendant. In response to a Bank Negara letter dated 22 March 1999, the 1st defendant, as solicitors for the 4th defendant, replied to the 1st plaintiff as follows:

> Dear Sirs,
>
> **Re: Damage caused by fire to factory at Bemban Industrial Park, Batu Gajah on the 23/2/98 belonging Doree Industries (M) Sdn. Bhd. ("the Insured")**
>
> 1. ...
> 2. ...
> 3. Notwithstanding the foregoing, *we write to confirm that the investigations which were undertaken by Thomas Howell Group (Malaysia) Sdn. Bhd. and Forensic Services (M) Sdn. Bhd. which were coordinated by us as solicitors for our clients, have now been completed and the reports made available to us as solicitors* as recently as the 26th of March 1999. *These reports are privileged documents which have been made available to us in our capacity as solicitors.* We are accordingly not obliged and will not make available to you copies of the same.

4. *Please be informed that the said loss adjusters and forensic experts have through the course of their investigations secured circumstantial as well as direct physical evidence which indicates and establishes that the fire which destroyed the factory was not fortuitous in origin and that the claim is therefore fraudulent.* Consequently, please be advised that we have been instructed to deny liability under the policy and to repudiate the claim.

5. We confirm that we have instruction to accept service of process on behalf of all insurers concerned. (emphasis added)

Yours faithfully,

c.c. 1. Pengarah,
Jabatan Pengawalan Insurans,
10th floor, Block C,
Bank Negara Malaysia,
Jalan Dato Onn,
50000 Kuala Lumpur.
By Fax: 03-2912990/By Courier
Attn: Mr. Lee Eng Huat
(Ref: 7318/19/1/1/3.99

2. Messrs L.A. Gomes & Co.,
Advocates & Solicitors,
No. 10, Jalan Selamat,
Greentown (next to Ipoh Parade),
30450 Ipoh,
Perak Darul Ridzuan.
By Fax: 05-2542955/By Courier
(Ref: LG/MARK/CFB/IP/HP/40/98)

3. The Manager, Claims,
General Insurance Division,
Aetna Universal Insurance Sdn Bhd
Menara Aetna Universal,
84, Jalan Raja Chulan
50200 Kuala Lumpur.
By Fax: 03-2624939/By Courier
Att: Mr. Simon Quah
(Ref: PKD 98 R 00005)

4. Claims Officer,
Non-Life Department,
Arab-Malaysian Assurance Berhad,
9th Floor, Bangunan AMDB,
No. 1, Jalan Lumut,
50400 Kuala Lumpur.
By Fax: 03-4438680/By Courier
Attn: Cik Rohaiza bte Zakaria

5. Claims Manager,
MBf Insurans Berhad,
Level 41, Plaza MBf,
No. 8, Jalan Yap Kwan Seng,
50450 Kuala Lumpur.
By Fax: 03-2632137/By Courier

6. Claims Manager,
Mayban Assurance Berhad,
27 Lorong Medan Tuanku Satu,
50300 Kuala Lumpur.
By Fax: 03-2914930/By Courier.

The four plaintiffs have alleged that the four defendants falsely and maliciously caused to be printed and published "by extending a copy of the letter dated 6 April 1999 to the Pengarah, Jabatan Pengawalan Insurans, Bank Negara containing false and malicious subjective assertions which were arrived at by the four defendants, jointly and severally, upon reading the various reports prepared by the 2nd and 3rd defendants" and that by doing so they have caused detriment to the four plaintiffs.

There was also publication of the defamatory letter by way of carbon copying the letter to M/s L.A. Gomes & Co., a firm of advocates and solicitors practising in Ipoh which had no business to receive the same.

The words used in the letter dated 6 April 1999 in their natural and ordinary meanings meant and by way of innuendoes were understood to mean that the plaintiffs were arsonists and had deliberately burnt the factory themselves in order to cheat the four defendants so as to claim the insurance moneys.

This has not only injured the plaintiffs' reputation but also deprived the 1st plaintiff of its insurance claims.

All these facts and background are found in the plaintiffs' amended statement of claim filed on 11 September 1999 (encl. 7). The court notes that the only difference between the plaintiffs' statement of claim filed on 10 August 1999 (encl. 1) and their amended statement of claim is the addition of a new sub-para (x.a), to para 26, to claim general damages from the four defendants.

In para 26 of their amended statement of claim the four plaintiffs have claimed the following reliefs from the four defendants:

(i) *An injunction to restrain the 1st, 2nd, 3rd and 4th Defendants from further publishing and circulating the forensic reports in regard to the fire which destroyed the Plaintiff's factory on the 23rd February 1998.*

(ii) A declaration that the Plaintiffs herein are entitled to all the forensic reports and findings now in the possession of the 1st to 4th Defendants;

(iii) A declaration that the report or reports prepared by the 2nd Defendants are null and void;

(iv) A declaration that the 3rd Defendants are a decoy company which has no *locus standi* and any report prepared by them is null and void;

(v) Special Damages in the sum of RM3,665,458.00 being insurance due under the policies as tabulated in the Statement of Claim;

(vi) Special Damages in the sum of RM765,963.00 being 24% of the total amount of tabulated in annexure 1 of foreseeable pecuniary loss and additional claims;

(vii) Loss of future earnings in the sum of RM1,700,308.00 being 24% of the amount tabulated in annexure 2;

(viii) Against the 1st, 2nd, 3rd and 4th Defendants and each of them under paragraphs 11 and 12 *aggravated damages for libel and/or malicious falsehood* and subscribe to the global sum outlined in (10) below;

(ix) Against the 1st, 2nd, 3rd and 4th Defendants and each of them under paragraph 15 *aggravated damages for libel and/or malicious falsehood* and subscribe to the global sum outlined in (10) below;

(x) aggravated damages against the 1st, 2nd, 3rd and 4th Defendants and each of them for libel and malicious falsehood in the global sum of RM9.0 million only payable in the proportion of RM3.0 million for the 1st Plaintiff and RM2.0 million each for 2nd, 3rd and 4th Plaintiffs respectively;

(x.a) and/or in the alternative as against the 1st, 2nd, 3rd and 4th defendants and each of them general damages payable to the 1st, 2nd, 3rd and 4th plaintiffs, respectively;

(xi) interests;

(xii) costs;

(xiii) such further relief as the court deems fit.

Application To Strike Out

On 1 December 2000, ie about one year two months after the 2nd defendant had entered its defence, the 2nd defendant applied *vide* its summons-in-chambers (encl. 75) to strike out the plaintiffs' amended statement of claim pursuant to O. 18 r. 19(1) of the Rules of the High Court 1980 (hereinafter referred to as "the RHC") on the ground that:

(a) it does not disclose a reasonable cause of action;

(b) alternatively, the claim by the 2nd, 3rd and 4th plaintiffs in this action against the 2nd defendant be struck out as being frivolous and vexatious and an abuse of the process of the court.

Amended Statement Of Claim

In order to determine whether the application of the 2nd defendant has or is devoid of merits the court has to examine the plaintiffs' amended statement of claim. In the plaintiffs' lengthy statement of claim the plaintiffs have alleged, *inter alia*, as follows:

5) *The 2nd Defendants* either by themselves or through their agents or associates or in association with persons unknown purportedly inspected the factory area and compound on known and unknown dates and took damaged samples burnt out debris and items unknown, soil, sand, and all sorts of items now in their custody without the knowledge and consent of the Plaintiffs for so-called inspection and verification and thereafter *caused biased report or reports to be produced in favour of the 4th Defendants.*

6) The 1st, 2nd, 3rd and 4th Plaintiffs herein aver and categorically affirm that *the 4th Defendant connived and colluded with the 1st, 2nd and 3rd Defendants to deceive and defraud the 1st Plaintiffs by producing inaccurate reports to defeat the 1st Plaintiffs' claim and pecuniary interest.*

7) The *3rd Defendants* are a private company purportedly incorporated in Malaysia with limited liability although it does not exist in the Registrar of Companies and *are carrying on a type of business by styling themselves as forensic scientists and consultants who were engaged by the 2nd Defendants with the knowledge and complicity of the 4th Defendants to analyse items and things taken in the 1st Plaintiffs' burnt down factory* without the knowledge and consent of the Plaintiffs for forensic tests *and produced report or reports that are false and untrue against the Plaintiffs in order to defeat the Plaintiffs' claims.*

8) ...

9) The 1st, 2nd, 3rd and 4th Plaintiffs aver that the forensic report or reports used and relied on by the 4th Defendants were prepared either individually and/or jointly by scientists or consultants working in the 3rd Defendants and some person or persons in the 2nd Defendants or by person or persons unknown but are in the employ of the 2nd, 3rd and 4th Defendants and the same were admittedly co-ordinated by the 1st Defendants as solicitors for the 4th Defendants.

10) *The 1st, 2nd, 3rd and 4th Plaintiffs were not given any copy of the report or reports in spite of several requests.* As a result the 1st Plaintiffs wrote to Bank Negara on 16th March, 1999 to complain against the 4th Defendants and *in response to a Bank Negara letter dated 22nd March, 1999, the 1st Defendants as solicitors for the 4th Defendants replied to the 1st Plaintiffs as follows,*

(This letter has already been reproduced above)

11) In the circumstances *the 1st, 2nd, 3rd and 4th Defendants falsely and maliciously caused to be printed and published by extending a copy of the letter dated 6th April, 1999* addressed to the 1st Plaintiffs' director to the Pengarah, Jabatan Pengawalan Insurans, Bank Negara *containing those false and malicious subjective assertions which were arrived at by the Defendants jointly and severally upon reading the various reports prepared by the 2nd and 3rd Defendants* to the detriment of the 1st, 2nd, 3rd and 4th Plaintiffs.

12) In the same breath the 1st, 2nd, 3rd and 4th Plaintiffs aver that *the same letter referred to in paragraph 11 was carbon copied to M/s L.A. Gomes & Co., a firm of advocates & solicitors practising in Ipoh which had no business to receive the same.*

13) *The said words as used in the letter dated 6th April, 1999 in their natural and ordinary meanings meant and by way of innuendoes were understood to mean as follows,* that is to say,

(a) *that the 1st Plaintiffs by themselves and through the dire acts of the 2nd, 3rd and 4th Plaintiffs acted with criminal intent and burnt the factory themselves;*

(b) *that the 1st Plaintiffs by themselves and the 2nd, 3rd and 4th Plaintiffs meant to cheat the 4th Defendants on the insurance claims;*

(c) *that since the fire was not fortuitous the only people who could have burnt it were the 2nd, 3rd and 4th Plaintiffs by themselves or in collusion with others.*

14) *By reason of the publication of the said words the 1st, 2nd, 3rd and 4th Plaintiffs have been injured in their reputation and are made to look like cheats, crooks and arsonists whereby their standing, honour and integrity have been brought into public scandal, odium and contempt.*

PARTICULARS OF INNUENDOES

The 1st, 2nd, 3rd and 4th Plaintiffs hereby repeat paragraph 13(a), (b) and (c) above.

15) *Further or in the alternative, the said words were false and were published maliciously.*

PARTICULARS OF FALSITY

(i) *That the 1st, 2nd, 3rd and 4th Plaintiffs committed arson when the same is not true.*

(ii) *That the 1st, 2nd, 3rd and 4th Plaintiffs are liable to be charged by the public prosecutor as suspected criminals;*

(iii) *That the cause of the fire was not fortuitous;*

PARTICULARS OF MALICE

(i) The 1st, 2nd, 3rd and 4th Plaintiffs repeat paragraph 1 to 15 here;

(ii) The 1st Plaintiffs purchased the various insurance policies from the 4th Defendants as a *sine quo non* for loans given by the various finance companies to the 1st Plaintiffs from insurance companies recommended or associated with them or approved by them;

(iii) The 1st, 2nd, 3rd and 4th Plaintiffs aver that this has resulted in a conflict of interests;

(iv) The inordinate delay in the preparation of the so-called reports and the refusal of all the Defendants to give any of the reports to the Plaintiffs or their solicitors;

(v) The lack of transparency by refusing to disclose the names of the investigators and confirm the official status of the 3rd Defendant.

16) The 1st Plaintiffs shall contend at the trial that *all the Defendants* either by themselves and/or each of them acted without lawful authority from the 1st, 2nd, 3rd or 4th Plaintiffs in entering the burnt-down factory and thereby *conniving with the 4th Defendants to act in conflict of interest against the 1st Plaintiffs.*

17) *The 1st Plaintiffs had* on diverse dates *purchased several Machinery Equipment All Risks Policies and/or also Consequential and Fire Insurance Policies from the said 4th Defendants* where the benefits were assigned to numerous finance companies which provided the finance to the 1st Plaintiffs for the purchase of the machinery and equipment.

18) ...

19) *The 1st, 2nd, 3rd and 4th Plaintiffs aver that they had no knowledge as to how the fire started whereupon the Plaintiffs lodged a police report* at the Pusing police station *vide* Report No. 186/98 on the 23rd day of February, 1998 and the Plaintiffs herein verily repeat paragraph 15.

20) *The 1st, 2nd, 3rd and 4th Plaintiffs aver that the police investigated into the fire and* collected twelve (12) envelopes of samples and debris from the burnt down factory and handed them to *the Jabatan Kimia Malaysia which vide its report No. IP-408/98-0 issued on the 31st March, 1998 categorically stated that it did not find any inflammable hydrocarbons* on the contents in the envelopes marked 'E-1' to 'E-12' submitted by the police. The Plaintiffs shall produce a copy of the report at the trial.

21) The 1st, 2nd, 3rd and 4th Plaintiffs further aver that *the Kinta District Police vide its report dated 12th March, 1999 stated as follows,* that is:

> The fire was caused by internal accident (suspected due to the fault of a small generator in the factory.) From the investigation conducted, there were no signs of criminal activity.

22) The 1st, 2nd, 3rd and 4th Plaintiffs further contend that *the reports submitted by the 2nd and 3rd Defendants respectively were concocted and that any finding made against the Plaintiffs were premeditated and aimed at negating the Plaintiffs' claim against the 4th Defendants.*

23) The 1st, 2nd, 3rd and 4th Plaintiffs shall contend at the trial that the non-disclosure of the contents of the report to the Plaintiffs is *mala fide* and highly unconscionable and injuriously oppressive to all the Plaintiffs and is, to all intents and purposes, calculated to frustrate all the Plaintiffs' claim notwithstanding that *the 4th Defendants' total reliance on these secretive and opaque reports based on a subjective inference of fraud* was totally against the rules of natural justice and are, therefore, unconstitutional.

24) The Plaintiffs jointly aver that they have no knowledge as to who in the *2nd and 3rd Defendants carried out the false and malicious analyses of the items purportedly taken from the factory site or its environs.* As such, the Plaintiffs jointly deny the reports of the so-called forensic experts as unauthentic and dishonest and that the materials analysed were not homogenous.

25) *By reason of the matters aforesaid and the said words and inferences as used by 1st Defendants in their letter dated 6th April, 1999 were therefore meant to deny the 1st Plaintiffs of their claims against the 4th Defendants and to cause permanent pecuniary damage and loss to the 1st Plaintiffs and irreparable damage to the reputation of the 1st, 2nd, 3rd and 4th Plaintiffs by all the Defendants.* (emphasis added).

Registrar's Decision

On 28 November 2000 the learned deputy registrar ruled in favour of the 2nd defendant. In this appeal the plaintiffs are dissatisfied with the following findings of the learned deputy registrar, at pp. 6 to 8 of his judgment (encl. 88):

On the facts and gleaning from the pleadings of the statement of claim, *it is as 'plain as pikestaff' that the plaintiffs' claim for defamation is based on the letter of 6th April 1999,* which allegedly emanated from the law office of the 1st defendant to the plaintiff which apparently was extended to various other persons, apart from the plaintiff.

However *there is not an iota of evidence* which I can gather from the pleadings *which holds the 2nd defendant responsible for the publication of the said letter to the various persons cited by the plaintiffs.*

The role of the 2nd defendant was merely to prepare a report based on its investigations at the scene of the fire. The averments in paragraph 10 of the amended statement of claim only mentions the 1st defendant as being the person responsible for the said publication of the letter.

The allegations of the plaintiff that the 2nd defendant had "connived and colluded" with the 3rd and 4th defendant in the preparation of their allegedly damning report on the cause of the fire has no bearing on the present cause of action which is defamation brought about by the publication of the letter of 6th April 1999.

One should not be carried away with the allegations of business levelled against the 2nd defendant by the plaintiff and allow it to distract oneself from the *main cause of action here which is the publication of the letter dated 6th April 1999.* This I have borne in the forefront of my mind.

I see nothing in the pleadings to hold the 2nd defendant responsible directly or indirectly for the publication of the said letter of 6th April 1999.

For these reasons, I cannot but accede to the defendant's application that *the plaintiffs' claim be struck put against the 2nd defendant, as it is plain and obvious that there is no cause of action against the 2nd defendant.* (emphasis added.)

The Plaintiffs' Case

Before me, Mr. Ngan Siong Hing, the learned counsel for the plaintiffs, has submitted as follows:

(1) the 2nd defendant, having entered an unconditional appearance on 30 August 1999, was precluded or barred from applying under O. 18 r. 19(1) of the RHC to strike out the plaintiffs' statement of claim;

(2) no evidence is admissible yet the 2nd defendant filed a supporting affidavit (encl. 76) and the learned deputy registrar decided on a point of substantive law without a trial and without according to the plaintiffs a right to the cross-examination of the 2nd defendant's witnesses;

(3) the learned deputy registrar erred when he decided purely on the issue of publication of the report and did not deal with authorship of the report.

(4) this is not a plain and obvious case for striking out because the plaintiffs' claim against the 2nd defendant is not on the face of it obviously unsustainable. If it were so, it would not have taken the 2nd defendant one year two months to apply for the striking out of the plaintiff's statement of claim after it had entered its defence. This delay has prejudiced the plaintiffs because the plaintiffs have incurred costs;

The 2nd Defendant's Case

In response, Miss P.H. Looi, learned counsel for the 2nd defendant, has submitted as follows:

(1) the filing of an unconditional appearance does not preclude or bar the 2nd defendant from making an application under O. 18 r. 19(1) of the RHC to strike out the plaintiffs' statement of claim and there was no necessity for the 2nd defendant to file a conditional appearance first before it can resort to the striking out procedure under O. 18 r. 19(1) of the RHC;

(2) delay is not fatal to an application for striking out under O. 18 r. 19(1) of the RHC as there is no time frame prescribed in that rule. Therefore, the 2nd defendant can apply anytime; and

(3) the learned deputy registrar had relied solely on the statement of claim;

(4) it is clear from the statement of claim that the plaintiffs are claiming damages for defamation, ie libel, because of the publication of the letter by the 1st defendant to Bank Negara.

(5) the report which was prepared by the 2nd defendant in the course of their work is a privileged document and there is no publication of the report to any unauthorised party other than to their client, the 4th defendant. So the plaintiff should only sue the 4th defendant since the 4th defendant is the insurer;

(6) this is a plain and obvious case for striking out under O. 18 r. 19(1) of the RHC because there is nothing in the pleadings which can indicate that the 2nd defendant is responsible directly or indirectly for the publication of the said letter of 6 April 1999 (References were made to paras 1, 2, 3, 4 to 8, 9, 10, 11 and 13 of the statement of claim of which paras 5, 6, 7, 9, 10, 11 and 13 have been reproduced earlier on in this judgment);

(7) if the plaintiffs are saying that the 2nd defendant took part in the wrongful repudiation of liability by the 4th defendant, the plaintiffs must plead the tort of conspiracy but in the statement of claim as it stands the tort of conspiracy is not pleaded;

After hearing submissions from both the learned counsels, I allowed the plaintiffs' appeal (encl. 82) with costs in the cause.

I now state my reasons for arriving at that decision.

There are several issues which require the determination of this court. These issues are as follows:

(1) whether the 2nd defendant is precluded or barred from applying under O. 18 r. 19(1) of the RHC to strike out the plaintiffs' statement of claim on the ground that it disclosed no reasonable cause of action since the 2nd defendant has entered an unconditional appearance on 30 August 1999;

(2) whether delay is fatal to an application for striking out under O. 18 r. 19(1) of the RHC;

(3) whether the learned deputy registrar relied on the 2nd defendant's supporting affidavit (encl. 76) when he struck out the plaintiffs' claim against the 2nd defendant on the ground that it disclosed no reasonable cause of action;

(4) whether the learned deputy registrar erred when he failed to consider the authorship of the reports and decided against the plaintiffs solely on the absence of publication of the report/reports by the 2nd defendant to an unauthorised third party when he did not deal with the authorship of the report/reports;

(5) whether the plaintiffs' claim is solely for damages for defamation, ie libel, by virtue of the publication of the letter by the 1st defendant to Bank Negara and also to the Ipoh based legal firm of Messrs. L.A. Gomes & Co.;

(6) whether the plaintiffs have pleaded the tort of conspiracy in their statement of claim.

(7) whether this is a plain and obvious case for striking out under O. 18 r. 19(1) of the RHC;

Effect Of Filing An Unconditional Appearance

With respect to Mr. Ngan, I am unable to agree with his submission that once an unconditional appearance is filed, an application under O. 18 r. 19(1)(a) of the RHC cannot be filed.

The two cases cited by him in support of his proposition can be distinguished from the facts of the present appeal before me because in both the cases the challenge was mounted on a lack of *locus standi* or jurisdiction.

In the first case cited, *Brickwood Consolidated Sdn Bhd v. Kenneth Teh Ah Kian & Anor* [2000] 4 AMR 4853, his Lordship Abdul Malik b. Ishak J (at p. 4889, para 25) considered himself bound by several cases, *viz Lim Seak Huat v. Malayan United Realty Sdn Bhd* [1997] 5 CLJ 336 (his own decision); *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 CLJ 461; *Sheldon v. Brown Bryley's Steel Works Ltd & Dawnways Ltd* [1953] 2 QB 393; [1953] 2 All ER 894 CA; *Re Orr Ewing* 22 Ch D 463; and *Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & 5 Ors* [1999] 2 CLJ 886 (his own decision again), when he said as follows:

> These authorities when read in its proper perspective would be detrimental to the first defendant in its appeal in Encl 30. I have no choice but to dismiss Encl. 30 with costs.

Enclosure 30 was the first defendant's appeal against the decision of the learned senior assistant registrar in dismissing its application (encl. 17) under O. 18 r. 19(1) of the RHC.

With respect I disagree. In my opinion the facts of the authorities relied upon by his Lordship Abdul Malik b. Ishak J revolve around the issue whether a defendant who has entered an unconditional appearance can invoke O. 18 r. 19(1) in order to strike out a plaintiff's claim on the ground that the plaintiff has no *locus standi* to bring the proceedings in the first place.

In the second case cited, *Alor Janggus Soon Seng Trading Sdn Bhd (supra)*, the facts which are clearly distinguishable are briefly as follows:

The appellants were the shareholders of the 1st respondent, a limited company. They had brought a claim against the 1st respondent and the Managing Director of the company, the 2nd respondent, based on contract and tort alleging fraud on themselves as minority shareholders and alleging that a sale and purchase agreement for the sale of the company's shares was invalid on certain grounds. The agreement had been executed by the 2nd respondent, on behalf of the company on the one part and one C on the other part, after the company had resolved at an extraordinary general meeting to sell the company's shares to one N and one C. Under the agreement C was to pay the company a sum of RM1.95 million and obtain the discharge of a charge over land belonging to the company by paying the redemption sum, in return for the shares of the company and also shares in two other companies belonging to the company.

The minority shareholders successfully obtained an *ex parte* injunction to restrain the respondents from implementing the agreement. However, this was short lived because the respondents successfully applied to set aside the injunction *ex facie* on the ground that the appellants had no *locus standi* to

bring the minority shareholders' action against the company. On appeal, the Supreme Court held that the learned judge was wrong in dissolving the *ex parte* injunction. It further held that if the respondents were sure that the appellants had no *locus standi* or cause of action the correct procedure to be adopted by the respondents was to either invoke O. 18 r. 19(1) or O. 33 r. 2 of the RHC. However, since the respondents had already filed their unconditional appearance it was too late for them to do so.

It was in this context that his Lordship Jemuri Serjan CJ (Borneo) said as follows at p. 475:

> *Procedure*
>
> The question that immediately comes to our minds *is if the defendants are sure in their own minds that the plaintiffs have no locus standi or cause of action why did they not invoke O. 18 r. 19 or O. 33 r. 2 of the Rules of the High Court 1980* ('the RHC') because if they succeed in their applications on any of these orders the civil suit and the injunction itself would both collapse. We would demonstrate why invocation of O. 18 r. 19 or O. 33 r. 2 is the correct procedure by reference to authorities. The defendants rely heavily on the *Prudential Assurance* case to support their contention on the plaintiffs' lack of *locus standi*, and therefore, directed the main thrust of their arguments in that direction. Unfortunately, Encik John Khoo for the plaintiffs never at any time raised any objection to this unusual departure from the normal accepted procedure for reasons best known to himself as it seems obvious to us there are relevant questions to be raised in his favour. (emphasis added)

He continued as follows at p. 478

> It was open to the defendants to resort to O. 18 r. 19 or O. 33 r. 2 of our RHC but they chose not to do so but to bring up the *locus standi* issue on their application to set aside the injunction. On this ground alone, this appeal should succeed. *It is too late now for the defendants to invoke O. 18 r. 19 because they must have filed their unconditional appearance, thereby depriving themselves of the right to invoke O. 18 r. 19* but it is still open to them to have recourse to O. 33 r. 2 if they are so minded. (emphasis added.)

In the *Pet Far* case *(supra)*, his Lordship Abdul Malik bin Ishak J had referred to and followed his earlier decision in the *Lim Seak Huat* case *(supra)* when he held that the defendant was precluded from applying under O. 18 r. 19(1) of the RHC to strike out the plaintiff's claim since the defendant had entered an unconditional appearance and had served on the plaintiff a statement of defence. It is pertinent to point out here that one of the issues which had arisen for determination in the *Pet Far* case was whether the Malaysian courts had jurisdiction to hear the matter as the gambling contract between the 1st and 2nd defendants was carried out in international waters.

For my part, I would prefer to follow the decision of his Lordship Zakaria Yatim J in the case of *Bank Bumiputra Malaysia Bhd & Anor v. Lorrain Esme Osman & Anor Action* [1987] 2 MLJ 633 where at p. 635 para A and B, his Lordship said as follows when dismissing one of the defendant's application to strike out the plaintiff's statement of claim under O. 18 r. 19(1) of the RHC on the ground that the case had already been set down for trial:

> This rule does not specify a time limit during which a party may apply to the Court to strike out a pleading. But the application should be made promptly and as a rule before the close of the pleadings. The Court, however, may allow an application to be made even after the pleadings are closed. But such an application must be refused after the action has been set down for trial. See *The Supreme Court Practice*, 1985, v. 1, page 304.

This decision was followed in *Jamir Hassan v. Kang Min* [1991] 3 CLJ 2490; [1991] 2 CLJ (Rep) 773 by his Lordship Haidar J. In that case the plaintiff had applied under O. 18 r. 19 of the RHC to strike out the plaintiff's statement of claim on the ground that it disclosed no reasonable cause of action or is scandalous, frivolous or vexatious and/or may prejudice, embarass or delay the fair trial of the action or is otherwise an abuse of the process of the court. Mr. TO Thomas had objected to the application on the ground of delay as the plaintiff had filed the application well after the defence and counter claim was filed.

In rejecting the preliminary objection based on the issue of delay as being without merit his Lordship said as follows at p. 2492:

> While it may be true that in an O. 14 application, it must *normally* be filed before the defence is delivered, however, in an O. 18 application it would appear that there is no such constraint. Order 18 r. 19 of the RHC specifically provides 'The Court may *at any stage of the proceedings* order to be struck out or amended any pleading ... (emphasis added). The issue of delay in O. 18 application was considered by Zakaria Yatim J in *Bank Bumiputra Malaysia Bhd & Anor v. Lorrain Esme Osman and another action* where at p. 635 the learned judge said:
>
> > The rule does not specify a time limit during which a party may apply to the court to strike out a pleading. But the application should be made promptly and as a rule before the close of the pleadings. The court, however, may allow an application to be made even after the pleadings are closed. But such an application must be refused after the action has been set down for trial. See *The Supreme Court Practice* 1985, Vol 1, p. 304.
>
> I respectfully agree.

In my respectful opinion the words "at any stage of the proceedings" in O. 18 r. 19 of the RHC expressly exclude any time limit for the making of an application for striking out and these words should be given effect to. In *N.S. Bindra's Interpretation of Statutes*, 8th edn., at p. 195, the author has dealt with this point under the sub-heading "Legislature does not waste its words". It is clear from what he has written that it is a rule of statutory interpretation that the Legislature does not waste its words or say anything in vain. (See *Quebec Railway, Light, Heat & Power Co. Ltd. v. Vandry* AIR [1920] PC 181, 186 per Lord Summer.) The presumption is always against superfluity in a statute. (See *The Queen v. Bishop of Oxford* [1879] 4 QBD 245, 261 (per Cockburn, CJ); *Hough v. Windus* [1884] 12 QBD 224.)

Every part in a statute should be given as far as possible its full meaning and effect. (See *S.K. Shana Ltd v. State of Bihar*, AIR [1953] Pat 161.) No word is superfluous, redundant or surplus. (See *D.C. Sangma v. State of Assam*, AIR [1978] SC 17.) It is not permissible in interpreting a statute to omit words as redundant unless reading them in the statute would lead to absurdity. (See *Bhailal Jagadish v. Additional Commissioner, Akola*, AIR [1953] Nag 89).

I, therefore, hold that the mere fact that the 2nd defendant has filed an unconditional appearance and a statement of defence does not bar or preclude the 2nd defendant from applying to strike out the plaintiffs' claim under O. 18 r. 19 of the RHC because the words "at any stage of the proceedings" which qualify the words "The court may ... order to be struck out" in the rule itself presupposes the making of such an application unless the ground relied upon is a lack of *locus standi* or jurisdiction.

In *N. Caruppaya v. MBF Property Services Sdn Bhd & Anor* [2000] 4 CLJ 116 his Lordship Mohd Hishamuddin b. Mohd Yunus J had occasion to consider the same issue, ie whether the filing of an unconditional appearance and the serving of a statement of defence is a bar to the filing of an application under O. 18 r. 19 of the RHC, against the backdrop of the *Alor Janggus* case *(supra)*, the *Lorraine Esme Osman* case *(supra)*, the *Jamir Hassan* case *(supra)*, the *Lim Seak Huat* case *(supra)* and the *Pet Far* case *(supra)*.

In a very well reasoned judgment he has opted to follow the decisions of his Lordships Zakaria Yatim J in the *Lorraine Esme Osman* case *(supra)* and Haidar J in the *Jamir Hassan* case *(supra)*. I respectfully share his views.

He has said as follows at p. 121:

> ... In my judgment, the filing of an unconditional appearance does not preclude a defendant from making an application under Order 18 r. 19. I find nothing in the RHC providing, either explicitly or impliedly, to that effect. On the contrary, Order 18 r. 19 expressly provides that such an application may be

a made at any stage of the proceeding. The words "at any stage of the proceedings", to my mind, strongly imply that the right to make an application under Order 18 r. 19 is not conditional upon a filing of a conditional appearance. Such an application may be made, for example after the filing of the statement of defence; or, even after the pleadings are deemed to be closed. ...

b

Effect Of Delay

Following from what I have held in respect of the 1st issue, I am of the view that a delay of one year two months after the filing of the statement of defence is not fatal to the 2nd defendant's application made pursuant to O. 18 r. 19 because the trial date has not yet been fixed for the action. The explanation of Miss P.H. Looi that she only took over the case from the previous solicitors in June 2000 and in November 2000, she filed the application cannot be taken cognisance of by the court since it was a statement from the bar and was not contained in any affidavit.

c

d **Registrar's Reliance On Defendant's Affidavit**

I am satisfied from a perusal of the learned registrar's grounds of decision, in particular, the following excerpt of his judgment (encl. 88) that he did not rely at all on the 2nd defendant's supporting affidavit affirmed on 3 November 2000 and filed on 8 November 2000 (encl. 76) when he allowed the e defendant's application to strike out the plaintiff's claim on the ground that it did not disclose a reasonable cause of action (at p. 4):

> In her submission in support of her application to strike out Miss Looi for the 2nd defendant, she took pains to run through the plaintiffs' amended statement of claim with the court in particular the events that culminated in the letter of f 6th April 1999. This evinces itself in Paragraph 10 of the *amended statement* of claim wherein it is stated as follows:
>
> > *The 1st, 2nd, 3rd, and 4th Plaintiffs were not given any copy of the report or reports in spite of several requests. As a result the 1st Plaintiffs wrote to Bank Negara on 16th March, 1999 to complain against the* g *4th Defendants and in response to a Bank Negara letter dated 22nd March, 1999, the 1st Defendants as solicitors for the 4th Defendants replied to the 1st Plaintiffs as follows, ...*
>
> It was the contention of Miss Looi for the 2nd defendant that nowhere in the statement of claim can it be said that the 2nd defendant were responsible for h publication of the letter of 6th April 1999. The offending letter was in fact, according to the averments written by the 1st defendant as solicitors for the 4th defendant, the insurance company. No doubt the letter of 6th April 1999, made mention of the investigations and report conducted by the 2nd defendant but it emphasises the fact that the said report of the 2nd defendant was privileged. (emphasis added.)

i

Plain And Obvious Case/Frivolous And Vexatious/Abuse Of The Process Of Court

It has often been stressed and reiterated that the summary power of the court under O. 18 r. 19(1) to strike out a plaintiff's statement of claim is a most drastic power which should be exercised only in plain and obvious cases, cases which are obviously unsustainable and cases where the process of the court has not been used *bona fide*. (See *Sarjit Singh Khaira v. Government of the State of Sarawak & Anor* [1990] 2 CLJ 95; [1990] 3 CLJ (Rep) 59 (per Haidar, J); *Peck v. Russell* [1899] 1 QB 86, 91; *Low Yat v. Grace* [1947] MLJ 115; *Wenlock v. Moloney & Ors* [1965] 2 All ER 871, 874; *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corp. Bhd.* [1993] 4 CLJ 7 (per Mohamed Dzaiddin, SCJ); *S. Manikam & Ors v. Ismail bin Mohamad & Ors* [1997] 2 MLJ 90.)

In *Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor* [1984] 2 CLJ 88; [1984] 1 CLJ (Rep) 211 the Federal Court held that the mere fact that the plaintiff is unlikely to succeed at the trial is no ground for striking out the cause of action. His Lordship Wan Suleiman FJ who delivered the decision of the Federal Court said as follows at p. 92:

> It cannot be gainsaid that under O. 18 r. 19 pleadings will only be struck out in plain and obvious cases. So long as the Statement of Claim discloses some ground of action, the mere fact that the plaintiff is unlikely to succeed at the trial is no ground for striking out. See *Mooney v. Peat Marwick & Mitchell.* We need only refer to a passage from another authority referred to by learned counsel, the Privy Council decision in *Rediffusion (Hong Kong) Ltd. v. Attorney General of Hong Kong:*
>
> > It is a well established principle that the summary power under R.S.C. Order 18 r. 19 to strike out a writ or pleading as disclosing no reasonable cause of action or defence should be exercised only in plain and obvious cases ... No evidence is admissible on a cause of action summons ... the only documents that can be looked at are the writ, the documents referred to in the writ ...

The court notes that the learned deputy registrar has not dealt with the second part of the 2nd defendant's application (encl. 75), ie to strike out the 2nd, 3rd and 4th plaintiffs' claim against the 2nd defendant on the grounds that the plaintiff's statement of claim is frivolous and vexatious and an abuse of the process of court under O. 18 r. 19(1)(b) and (c). This could be because he thought that it was unnecessary for him to do so since he had already struck out the plaintiff's statement of claim pursuant to O. 18 r. 19(1)(a). I shall now determine whether the 2nd, 3rd and 4th plaintiffs' amended statement of claim against the 2nd defendant is frivolous or vexatious or an abuse of the court process.

The 2nd and 3rd plaintiffs are the directors of the 1st plaintiff and the 4th plaintiff was employed as its resident manager/accountant. Is their claim against the 2nd defendant for damages for defamation frivolous and vexatious and an abuse of the process of the court? In his supporting affidavit affirmed on 3 November 2000 and filed on 8 November 2000 (encl. 7), Yap Kim Pin, a director of the 2nd defendant has stated in para 19 that they have no *locus* at all to commence and maintain the action because of two reasons. First, they are not referred to at all in the letter. In order for the tort of defamation to be established it is necessary that the words complained of as defamatory were published of and concerning the plaintiffs and each of them. Secondly, they cannot claim for the insurance moneys as a result of the fire because they were not the insured.

It is generally accepted that frivolous or vexatious actions mean cases which are obviously unsustainable. A frivolous or vexatious action is, therefore, one with no prospect of success and is often raised to embarass or annoy the other party to the action. (See *Attorney General of Duchy of Lancaster v. London and North Western Railway Co* [1892] 3 Ch 274).

In my opinion there is nothing in the 2nd defendant's supporting affidavit (encl. 76) to show that the 2nd, 3rd and 4th plaintiffs' claim against the 2nd defendant was filed to annoy or embarass the 2nd defendant. It is settled law that the affairs of a limited company such as the 1st plaintiff are conducted by directors such as the 2nd and 3rd plaintiffs and its officers such as the 4th plaintiff. Managers are in the same position as directors as regard liability in respect of any criminal proceedings. In cases of fraud or improper conduct the court will pierce the corporate veil in order for it to do justice by treating a particular company as identical with the person or persons who control that company.

In this respect the following excerpt at p. 92, of the *Peglin Development* case *(supra)* is relevant:

> We were referred to a number of cases, of which the most significant, in this respect, is *H.L. Bolton (Engineering) Co. Ltd. v. T.J. Graham & Sons Ltd.*
>
> *A company,* he says *may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does.* It also has hands which hold the tools and act in accordance with directions from the centre. *Some of the people in the company are mere servants and agents who are nothing more than hands to do the work* and cannot be said to represent the mind or will. *Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company.* (emphasis added.)

In this case the 4th defendant has denied liability and repudiated the 1st plaintiff's claim under the insurance policy on the ground that the claim is a fraudulent one as the fire was deliberately set based on the report/reports prepared by the 2nd and 3rd defendants. The 2nd and 3rd plaintiffs have claimed that they have been defamed by the 2nd defendant because if there was no such report/reports there would have been no allegation that the fire was an act of arson since the police investigations have already shown that there was no criminal activity which caused the fire. Their reputation is, therefore, at stake and they say they have suffered injury to their reputation.

In my view their claim cannot be said to be obviously unsustainable. The 4th plaintiff's claim that his reputation has been injured by virtue of the fact that he was the resident manager of the factory at that time is a reasonable one since as manager he is responsible for the day to day running of the factory and it cannot be said that his claim is without any prospect of success or intended to embarass or annoy the 2nd defendant.

It is clear from the decision of his Lordship Lim Beng Choon J in the case of *Institute of Commercial Management United Kingdom v. New Straits Times Press (Malaysia) Bhd* [1993] 2 CLJ 365 that it is not fatal to the cause of action for defamation if the name of the plaintiff is not mentioned.

At pp. 369 and 370, he said as follows:

> It is stated by the author of *Gatley on Libel and Slander* (8th Ed) that to succeed in an action of defamation, the plaintiff must not only prove that the defendant published the words and that they are defamatory: he must also identify himself as the person defamed. This proposition is elementary bearing in mind that the law of defamation recognises in every man a right to have the estimation in which he stands in the opinion of others untarnished by false statements to his discredit. It is therefore an essential element of the cause of action for defamation that the words complained of should be published 'of the plaintiff'. What then is the test to which the plaintiff has to furnish an answer to satisfy the court that the words complained of are in fact published of him? Per Issacs J in *David Syme v. Canavan* at p. 238, the test is defined in this way:
>
> > The test of whether words that do not specifically name the plaintiff refer to him or not is this: Are they such as reasonably in the circumstances would lead persons acquainted with the plaintiff to believe that he was the person referred to? *That does not assume that those persons who read the words know, all the circumstances or all the relevant facts.* But although the plaintiff is not named in words, he may, nevertheless, be described so as to be recognised; and *whether the description takes the form of a word-picture of an individual or the form of a reference to a class of persons of which he is or believed to be a*

a

> *member of any other form, if in the circumstances description is such that a person hearing or reading the alleged would reasonably believe that the plaintiff was referred to, that is sufficient reference to him.* (emphasis added.)

Another case on this point is the case of *Le Fanu v. Malcolmson.* In this case, *b* a newspaper article imputed that 'in some of the Irish factories' cruelties were practised upon the employees and the plaintiffs, who were owners of a factory in Ireland, had proven to the satisfaction of the jury that the newspaper article was referring especially to their factory. In an appeal to the House of Lords to arrest judgment for the plaintiff, the appeal was dismissed. In giving judgment, Lord Campbell said at p. 668:

c

> Where a class is described, it may very well be that the slander refers to a particular individual. That is a matter of which evidence is to be laid before the jury, and the jurors are to determine whether, when a class is referred to the individual who complains that the slander applied to him, in point of fact justified in making such complaint. This is *d* clearly a reasonable principle, because whether a man is called by one name, or *whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on, know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done as would be done if his name and christian name were ten times repeated.* (emphasis added.)

e

The third case which is relevant is the case of *Lewis v. Daily Telegraph Ltd* where Lord Reid at p. 258 has this to say about the scope of the natural and ordinary meaning of the words complained of:

> There is no doubt that in actions for libel the question is what the words *f* would convey to the ordinary man: it is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction. *So he can and does read between the lines in the light of his general knowledge and experience of wordly affairs.* I leave aside questions of innuendo where the reader has some special knowledge which might lead him to *g* attribute a meaning to the words not apparent to those who do not have that knowledge. That only arises indirectly in this case. There has been much argument about innuendoes, true or false, and about proper methods of pleadings. My noble and learned friends intend to deal with those matters and I shall not add to their explanations. I shall only make some observations on the footing that in this case there is no question *h* of innuendo in the true sense.
>
> What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. (emphasis added)

i

With regard to abuse of process the following excerpt from the judgment of his Lordship Gopal Sri Ram JCA in the case of *Jasa Keramat Sdn Bhd & Anor v. Monotech (M) Sdn Bhd* [1999] 4 CLJ 533, at p. 540 is relevant:

> The law
>
> It is trite that a person who has a legitimate grievance may invoke the court's process to obtain redress. But cases may arise where the true purpose for invoking the court's process is something other than to obtain a remedy provided by law. It may be to oppress a defendant. Or it may be to apply pressure upon him which the law regards as illegitimate. Or it may be to merely commence an action and let it hang over the head of the defendant with no intention of bringing it to a conclusion (see *Grovit & Ors v. Doctor & Ors* [1997] 2 All ER 417). Or the plaintiff having commenced an action may take steps to discontinue it after the defendant has become *dominis litis*, thereby preventing the defendant from obtaining vindication through a judgment of the court. In the last instance, the court will refuse to permit discontinuance, or if a notice of discontinuance has been filed, will set it aside and direct the action to proceed (see *Overseas Union Finance Ltd v. Lim Foo Chong* [1971] 2 MLJ 124; *Castanho v. Brown & Root (UK) Ltd & Anor* [1981] AC 557).

Applying the above principles of law to the facts of the present case, I am of the view for reasons already set out above that the 2nd, 3rd and 4th plaintiffs have a legitimate grievance and that they have instituted the action in order to obtain a remedy provided by law. It cannot be said that their intention is to oppress the 2nd defendant or to apply pressure on the 2nd defendant. In fact the 2nd defendant's supporting affidavit (encl. 76) does not contain any of these allegations. Further, the fact that in their claim for damages for defamation the 2nd, 3rd and 4th plaintiffs are not entitled to claim the insurance moneys does not mean that their claim is frivolous and vexatious and an abuse of process because they have also claimed aggravated damages for libel and general damages as well.

Publication To A Third Party

It is apparent from a perusal of the plaintiffs' statement of claim that the plaintiffs' main cause of action is anchored on the tort of defamation, ie the tort of libel. What the plaintiffs are claiming for is the right that their reputation shall not be disparaged by the alleged written defamatory statements made about them to a third person or persons, ie the Pengarah, Jabatan Pengawal Insurans, Bank Negara and to M/s L.A. Gomes & Co. without lawful justification or excuse. The plaintiffs' action is intended to vindicate their reputation and for the defendants to make reparation for the injury done by the wrongful publication of the alleged libellous statements.

As mentioned earlier on in this judgment the 1st plaintiff is a private limited company. It is trite law that a corporate body may maintain an action for libel or slander in the same way as an individual except that the imputation must reflect upon the company itself and not upon its members or officials only.

Under the sub-heading "Who may be sued", the following passage in *Halsbury's Laws of England*, 4th edn., reissue, vol. 28, *Libel and Slander*, at para 32, p. 17, reads as follows:

> 32 The publisher.
>
> As a general rule, the person to be sued as the defendant in an action of libel or slander is he who has published the defamatory statement or caused it to be published.

The fact that the 2nd defendant is relying on the defence of qualified privilege, ie that the alleged defamatory report/reports complained of were published to the 4th defendant on an occassion of qualified privilege, by itself, presupposes that the plaintiffs have a reasonable cause of action based on libel. The 2nd defendant is contending that the occasion is privileged because the 2nd defendant had a contractual duty to make known the alleged defamatory report/reports to the 4th defendant and the latter had a corresponding contractual duty to receive it. It is clearly stated in the alleged defamatory letter dated 6 April 1999 which was sent by the 1st defendant, acting on behalf of the 4th defendant, to the third persons concerned that the allegation of the 1st defendant that the 1st plaintiff's insurance claim is fraudulent was based on the alleged defamatory report/reports prepared by the 2nd and 3rd defendants who have been mentioned in the letter by their names, ie "Thomas Howell Group (Malaysia) Sdn. Bhd. and Forensic Services (M) Sdn. Bhd." The burden is, therefore, on the 2nd defendant to prove on the balance of probabilities that it is entitled to the defence of qualified privilege. Here the 2nd defendant is sued together with the 1st, 3rd and 4th defendants on the basis that the 2nd defendant is jointly and severally liable.

With regard to the question of joint and several liability, the following passage at p. 19 of the same book is relevant and reads as follows:

> 38 **Joint and several liability**
>
> Every person who takes part in or procures the publication of a libel is *prima facie* jointly and severally liable for all the damage caused by it. Thus if a libel appears in a newspaper, the author of the libel (See *Bond v. Douglas* [1936] 7 C & P 626) and the proprietor, editor, printer, publisher and vendor of the newspaper are *prima facie* jointly and severally liable. ... where the plaintiff sues persons jointly liable in one action and enters judgment against one defendant, he may continue the

action against the other if the judgment against the first remains unsatisfied, but he cannot record against the second defendant more than the amount of the judgment entered against the first defendant.

Under the sub-heading "Publication of Libel" in the same book the folowing passages are also relevant:

At page 32

60 *Need for publication*

No action for a libel will lie unless there has been a publication. In a civil action for libel the plaintiff must allege and prove that the defendant published, or cause to be published, "of and concerning the plaintiff", the words complained of to a third person, namely to some person other than the plaintiff.

At page 33

62 *What amounts to publication*

For the purposes of a civil action for libel, publication is the communication of defamatory matter to a third person ... Publication [of a libel] consists in making known the defamatory statement ... **Each communication of a libel is a separate publication in respect of which a civil action may be brought.** (emphasis added.)

Applying the principles of law reproduced above to the facts of the present appeal the court finds as follows:

(a) the learned deputy registrar erred when he decided solely on the absence of publication of the alleged defamatory letter dated 6 April 1999 on the part of the 2nd defendant to the third persons concerned. He had failed to consider that there was publication by the 2nd defendant of the alleged defamatory report/reports and he had held that the only publication was by Messrs. Sri Ram & Co., the 4th defendant's solicitors, when in fact it is clear from para 3 of the alleged defamatory letter set out in para 10 of the plaintiffs' statement of claim that the 1st defendant while acting as the solicitors for the 4th defendant, the plaintiffs' insurer, had coordinated the investigations which were undertaken by the 2nd and 3rd defendants and to whom (the 1st defendant) the alleged defamatory report/ reports were made available by the 2nd defendant as recently as 26 March 1999 and that, therefore, there was publication by the 2nd defendant to the 4th defendant and from the 4th defendant to the 1st defendant and from the 1st defendant to the third persons concerned of the findings in the alleged defamatory report/reports;

(b) the learned deputy registrar also erred when he did not consider para 4 of the alleged defamatory letter which has categorically stated that "the said loss adjusters (ie the 2nd defendant) and forensic experts (ie the 3rd defendant) have through the course of their investigations secured circumstantial as well as direct physical evidence which indicate and establish that the fire which destroyed the factory "was not fortuitous in origin and that the claim is therefore fraudulent";

(c) it is clear that the contents of para 4 show that the contents of the alleged defamatory report/reports which were wholly or partly authored by the 2nd and 3rd defendants were communicated to the 4th defendant who must have relied on the truth and accuracy of their contents when the 4th defendant denied liability under the insurance policy and repudiated the 1st plaintiff's insurance claim and, therefore, there is sufficient publication to a third party which would entitle the plaintiffs to sue the 2nd defendant for damages for libel;

(d) based on the plaintiffs' statement of claim, in particular, paras 11, 12, 13, 14, 19, 20, 21, 22 and 24 (reproduced earlier on in this judgment), viewed against the backdrop of the law of defamation the plaintiffs have a reasonable cause of action against the 2nd defendant and, therefore, the learned deputy registrar was wrong when he allowed the plaintiffs' statement of claim to be struck out under O. 18 r. 19(1)(a);

(e) the fact that in para 3 of the alleged defamatory letter the reports of the 2nd defendant, Thomas Howell Group (M) Sdn. Bhd. and the 3rd defendant, Forensic Services (M) Sdn. Bhd. have been described by the 1st defendant as "privileged documents" should not be construed to mean that the tort of defamation cannot be invoked against the 2nd defendant by the plaintiffs. The reason is simple. The burden is on the 2nd defendant to prove that the alleged defamatory reports are privileged documents. In my view there is a very important difference in law between privileged documents and documents made on a privileged occasion. In the case of the former, if successfully invoked, they need not be produced in court as evidence. In the case of the latter, if successfully invoked, they constitute the defence of qualified privilege.

(f) Even if the 2nd defendant can successfully prove the defence of qualified privilege the matter does not end there because the burden then shifts back to the plaintiff to prove malice. Here, in paras 11, 15 and 24 of the plaintiffs' statement of claim (reproduced earlier on in this judgment), the plaintiffs have alleged malice on the part of the 2nd defendant;

Tort Of Malicious Falsehood/Tort Of Conspiracy To Injure

Quite apart from the cause of action based on the tort of defamation, the plaintiffs are also relying on two other causes of action based on the torts of malicious falsehood and conspiracy to injure.

In *Kaye v. Robertson* [1991] FSR 62, 67 Glidewell LJ described the essentials of the tort of malicious falsehood as follows:

> [T]he essentials of this tort are that the defendant has published about the plaintiff words which are false, that they were published maliciously and that special damage has followed as the direct and natural result of their publication.

In *Clerk & Lindsell on Torts*, 18th edn., 2000, the following passage (at p. 1244) concerning a comparison between the two torts is relevant:

> 23-30 *Malicious falsehood and defamation compared*
>
> Although malicious falsehood and defamation have different origins, there are obvious similarities between the two actions and the same facts may constitute both torts ... However, there are clear and substantial differences between the torts, the most basic of which is that defamation protects the claimant's reputation, while malicious falsehood protects the claimant's interest in his property or trade (or economic interests more generally).

Another very important difference is that an action for malicious prosecution survives the death of the claimant unlike an action for defamation. (See *Hatchard v. Mege* [1887] QBD 771).

Paragraph 5 of the plaintiffs' statement of claim alleges that the 2nd defendant has caused biased report or reports to be produced in favour of the 4th defendants. Paragraph 11 specifically alleges that "the 1st, 2nd, 3rd and 4th defendants falsely and maliciously caused to be printed and published by extending a copy of the letter dated 6 April 1999 addressed to the 1st plaintiffs' director to the Pengarah, Jabatan Pengawalan Insurans, Bank Negara containing those false and malicious subjective assertions which were arrived at by the defendants jointly and severally upon reading the various reports prepared by the 2nd and 3rd defendants to the detriment of the 1st, 2nd, 3rd and 4th plaintiffs." Paragraph 12 alleges publication to a non-interested 3rd party.

Paragraph 15 also alleges that the said words were false and were published maliciously. Paragraphs 26 (viii), (ix) and (x) expressly set out the plaintiffs' claim against all the 4 defendants for aggravated damages for libel and/or malicious falsehood. The 1st plaintiff is also claiming against all the defendants for special damages arising from the wrongful repudiation by the 4th defendant of its claim for the insurance moneys. The court is of the view that these paragraphs contain the averments necessary to invoke the tort of malicious falsehood over and above the tort of defamation against all four defendants.

With regard to the third cause of action which is based on the tort of conspiracy to injure, the court is of the view that the relevant averments are contained in paras 6, 7, 9, 10, 16, 23, 25 of the plaintiffs' statement of claim.

For reasons set out above, the court is of the view that at this stage of the proceedings all three causes of action are reasonable and that the plaintiffs' claim against the 2nd defendant should be allowed to go for trial.

In the premises I allowed the plaintiffs' appeal (encl. 82) with costs and set aside the order of the learned deputy registrar dated 28 November 2000.